No. 80-1073

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH N. MARCAL, III,
Appellant,

versus

STATE OF LOUISIANA,
Appellee.

On Appeal from the Supreme Court of
The State of Louisiana

## MOTION TO DISMISS


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## STATEMENT OF THE CASE

The appellant was convicted after a bench trial of two counts of public bribery in violation of La.R.S. 14:118. He was sentenced to one year at hard labor on each count, the sentences to run concurrently. The first count of the indictment alleged that on or about March 20, 1975, the defendant paid Mrs. Dorothy Boyd, an

Orleans Parish Deputy Clerk of Court, two hundred dollars in cash to assign one of his cases to a particular section of Criminal District Court. The second count alleged that that identical offense took place on May 16, 1975, and that the defendant gave Mrs. Boyd a check for two hundred dollars.

Mrs. Boyd testified, under a grant of immunity, that she had assigned the cases as Mr. Marcal requested and that he had paid her for these services. Her testimony was corroborated by other state witnesses. The defendant's former secretary, Mrs. Beatty, testified that on the day of the first allotment, the defendant had taken two hundred dollars from his law office. Later, she claimed he told her that he had used the money to bribe Mrs. Boyd. On May 16, 1975, the defendant asked Mrs. Beatty to stay late to give an envelope to Mrs. Boyd. Mrs. Beatty testified that she had opened the envelope and found a two hundred dollar check payable to Mrs. Boyd on Mr. Marcal's Attorney-at-Law account. She further testified that she gave the envelope to Mrs. Boyd. Mr. Mitchell, an attorney who had rented office space from the defendant, testified that the defendant often boasted that he could have cases assigned to a particular section and that he had witnessed the May 16 transfer of the check.

The appellant argued both alibi and the lack of credibility of the witnesses. Both Mrs. Beatty and Mr. Mitchell admitted to having financial disputes with the

defendant. Defendant also made much of the inability of the state to produce the check or any records from the banks which would verify its existence.

Marcal appealed his conviction to the Supreme Court of Louisiana, which Court affirmed in a decision rendered on January 28, 1980. (See Appellant's Appendix A, pp. 1-8) The Supreme Court of Louisiana thereafter granted rehearing of the appeal on limited grounds, and, on June 23, 1980, again affirmed appellant's conviction and reinstated its original opinion. (See Appellant's Appendix B, pp. 9-13)

## ARGUMENT

The State of Louisiana respectfully avers that this case is not properly before this Honorable Court on appeal, and prays that it be dismissed on the following grounds, as more fully set out below:

(a) The appeal is not within this Court's jurisdiction.

(b) The appeal does not present a substantial federal question.

(c) The federal question sought to be reviewed was neither properly raised nor expressly passed on.

Appellant attempts to invoke the appellate jurisdiction of this Court under the provisions of 28 U.S.C.

§1257(2). He alleges that Article 5, Section 5(C) of the Louisiana Constitution of 1974, as interpreted by the Supreme Court of Louisiana, is unconstitutional in light of this Court's holding in *Jackson v. Virginia*, 443 U.S. 307 (1979).

It should be noted at the outset, that in the original majority opinion rendered by the Supreme Court of Louisiana on appellant's case there is made no express mention of either Article 5, Section 5(C) of the State Constitution or the effect of the *Jackson* decision thereupon. Nor was review under the *Jackson* standard urged upon that Court by appellant in his original brief. Marcal relied upon *Jackson* for the first time in his Petition for Rehearing, obviously inspired by Justice Dennis' concurring opinion in the original decision in which he proposes *Jackson* as the appropriate standard of review and concludes that in this case a rational trier of fact could have found guilt beyond a reasonable doubt. (See Appellant's Appendix A at 8-9).

On rehearing, the Supreme Court of Louisiana again affirmed Marcal's conviction. The opinion on rehearing does not mention the *Jackson* issue (although belatedly urged by appellant in his Petition for Rehearing) because the rehearing was limited to the question of the alleged bias of the district attorney. (See Appellant's Appendix "B" at 9.) Since Marcal raised the *Jackson* issue for the first time in a limited rehearing granted to consider a totally different issue, it is apparent, as alleged in (c), supra, that the federal question

sought to be reviewed in this case was neither properly raised before the Supreme Court of Louisiana, nor expressly passed on by that Court. This appeal should, therefore, be dismissed.

Furthermore, this Court should be aware that, contrary to appellant's basic contention in his jurisdictional statement, the Supreme Court of Louisiana has not interpreted Article 5, Section 5(C), Louisiana Constitution of 1974, to bar review of the type mandated by this Court in *Jackson*. Rather, as recently stated by the Supreme Court of Louisiana in *State v. Roy*, No. 80-KA-1513 (Jan. 26, 1981):

> . . . this court has now adopted the *Jackson* standard of review when evaluating allegations by defendants that the state presented insufficient evidence to prove an essential element of the crime charged beyond a reasonable doubt. *Roy, supra,* at 4.

Since the Supreme Court of Louisiana has fully embraced the *Jackson* standard of review, and has not interpreted Art. 5, La. Const. of 1974 in such a way as to bar such review, then appellant's invocation of this Court's jurisdiction under 28 U.S.C. §1257(2) is clearly without basis, constituting further reason why this appeal should be dismissed.

Additionally, as alleged in (b) above, this appeal should be dismissed for failure to present a substantial

federal question. When reviewed under the *Jackson* standard, the evidence in this case is clearly such that a reasonable trier of fact could easily have found beyond a reasonable doubt that Marcal committed public bribery on March 20, 1975, by paying Dorothy Boyd, a deputy clerk of Criminal District Court for the Parish of Orleans, $200.00 in cash to assign one of his cases to Section "C" of that Court; and, further, that he committed public bribery on May 16, 1975, by giving Dorothy Boyd a $200.00 check to cause another of his cases to be allotted to Section "C".

Not only did Dorothy Boyd testify fully at trial regarding her part in these two acts of public bribery, but Susan Beatty, Marcal's secretary in 1975, testified that Marcal had indeed paid Dorothy Boyd $200.00 on each occasion to fix the allotment, and Henry Mitchell, an attorney sharing space with Marcal, testified that Marcal had told him that he, Marcal, knew how to get cases allotted to certain sections of court by paying $200.00.

As he did in his argument to the trial judge, and in his brief and argument to the Supreme Court of Louisiana, Marcal now dwells on the fact that the cancelled check from the May 16, 1975, transaction was never found. Such negative evidence can not prevail against the credible testimony of Boyd, Beatty, and Mitchell since there are any number of possible explanations for the disappearance of such documents. Further, such "evidence" in no way affects the validity of appellant's con-

viction on the March 20, 1975 count, which was a cash transaction.

In any event, the trial judge heard all the witnesses and the identical defense arguments and resolved the conflicts therein against Marcal, as did the Supreme Court of Louisiana on two occasions. Under *Jackson v. Virginia, supra,* these findings are presumed to be correct. Appellant, therefore, presents no substantial federal question to this Court for adjudication.

In light of the above, the State of Louisiana respectfully submits that this appeal should be dismissed. Since the Supreme Court of Louisiana has adopted the *Jackson* standard, this case is clearly not appropriate for plenary review by this Honorable Court. The State would therefore urge, in the alternative, that if this Court should decide not to dismiss this appeal summarily, then it should, in the interest of comity, remand the case to the Supreme Court of Louisiana for that Court to make explicit its assessment of the sufficiency of the evidence in this case under the standard enunciated in *Jackson v. Virginia, supra.*

## CONCLUSION

The State of Louisiana respectfully asks this Honorable Court to dismiss this appeal, to deny the application for certiorari, and to affirm the judgment of the Supreme Court of Louisiana, or, in the alternative, to

remand the case for further findings as indicated above.

Respectfully submitted,

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J. KEVIN McNARY

## CERTIFICATE OF SERVICE

I, J. Kevin McNary, Attorney for Appellee, certify that a copy of the foregoing Motion to Dismiss the Appeal has been served upon opposing counsel by United States Mail, first class postage prepaid, by depositing same in the United States Mail at a receptable therefor provided at 619 South White Street, New Orleans, Louisiana 70119, the envelope bearing the following directions for delivery to opposing counsel:

F. Irvin Dymond
Dymond, Crull and Castaing
1220 N.B.C. Building
New Orleans, Louisiana 70112

This ____ day of April, 1981.

All parties required to be served have been served.

J. KEVIN McNARY
Attorney of Record for Appellee
State of Louisiana